Nos. 90-954 90-1004

In The

Supreme Court of the United States

October Term, 1990

RUFO,

Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL,

Respondents.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,

Petitioner,

v.

INMATES OF SUFFOLK COUNTY JAIL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF AMICI CURIAE FOR THE STATES OF TENNESSEE, ALASKA, ARKANSAS, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WYOMING, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORIES OF GUAM AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

This case presents the question whether a district court may refuse to delete provisions from a consent decree that require a State to satisfy obligations not imposed by federal law. That issue is of major importance to the 45 States/Territories that here file as amici, because virtually every State currently operates under one or more comprehensive remedial decrees affecting their prisons, mental hospitals and/or mental retardation centers. Many of those decrees have been in existence for more than a decade and have imposed heavy financial costs on the States while also leading to increasing federal court intrusions into program operations.

To the extent those costs and intrusions are necessary to remedy federal law violations, amici recognize that the States are required to bear them under our constitutional system. That same system, however, also demands that federal court intervention into state operations go no further than required to ensure compliance with federal law. *See, e.g., Rizzo v. Goode*, 423 U.S. 362, 377-78 (1976). In amici's view, the second half of this constitutional balance is too often disregarded in cases involving state institutions, as federal courts expansively enforce remedial decrees that are not properly tailored to legitimate federal law concerns.

In this case, for example, the district court, affirmed *per curiam* by the First Circuit, refused to delete a single-celling requirement for pre-trial detainees, not because it was constitutionally appropriate, but rather because it "was an important element of the relief sought in this litigation," Pet. App. 12a, and defendants had agreed to it more than a decade ago. The fact that, subsequent to the entry of the decree, this Court handed down a decision

directly on point, holding that pre-trial detainees have no federal right to a single cell, *see Bell v. Wolfish*, 441 U.S. 520, 541 (1979), was considered irrelevant by the district court.

That kind of inflexible approach to modification is required neither by this Court's precedents, as the district court supposed, nor by a sensible application of traditional equitable principles. *See System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961). On the contrary, especially when state programs are affected, federal court remedial decrees should be modified as necessary to ensure that they are not overbroad. *See Board of Education of Oklahoma City v. Dowell*, 111 S. Ct. 630 (1991); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). The fundamental principles of federalism and separation of powers that generally require federal courts to tailor remedies to violations also apply at the time of modification; and the countervailing interests in finality do not support a different conclusion.

Even when a decree is initially entered by consent, it still must be carefully tailored once consent is prospectively withdrawn through a modification motion. There is no place for rigid federal court enforcement of a contract indefinitely restricting the exercise of sovereign powers that would not otherwise be constrained by the supremacy of federal law. Such an approach is thus entirely inconsistent with basic federalism and Eleventh Amendment requirements. Indeed, the state officials whose consent is being invoked to bind the state were amenable to suit in federal court only because of the narrow, judge-made exception to the Eleventh Amendment deemed necessary to ensure that States would comply with federal law. *See Ex Parte Young*, 209 U.S. 123, 156-57 (1908). That exception cannot support the entirely different conclusion

that state officials are free to bind a State to *extra*-federal law requirements. *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984).

For those reasons, amici urge this Court to establish a flexible approach to modification motions aimed at ensuring that federal remedial decrees governing state programs continue to be properly tailored. Those decrees have a massive impact on state policies and cause substantial conflicts between the federal courts and democratically elected state officials. It is only proper that such costs not be borne by the States unless they are necessary to satisfy federal law.

ARGUMENT

A federal court consent decree binding state officials should be modified as necessary to ensure that it is no more intrusive than required to protect federal rights. The interests in having a properly tailored decree outweigh the limited finality interests in perpetuating a decree that is excessive. The consensual nature of a remedy, moreover, neither reduces the importance of tailoring the decree nor otherwise increases the justification for a more demanding modification standard.

I. FEDERAL COURT DECREES GOVERNING STATE PROGRAMS SHOULD BE MODIFIED WHENEVER NECESSARY TO ENSURE THAT THEY ARE NARROWLY TAILORED TO REMEDY FEDERAL LAW VIOLATIONS.

Contrary to the view of the courts below, this Court has not established a general rule prohibiting modification of remedial decrees absent extreme circumstances. Instead, the Court has consistently taken a pragmatic,

equitable approach to modification, weighing the competing interests in ensuring that a prospective decree is legally correct against the potential unfairness and inefficiency of relitigating matters that have once been resolved. In the specific context of a federal decree governing state programs, that balance supports a highly flexible approach to modification focusing on whether the decree goes beyond what is required to vindicate federal rights.

A. Motions to Modify Federal Decrees Are Subject To Traditional Equitable Considerations.

The district court in this case started from the premise that this Court has established an inflexible modification standard applicable to all federal equitable decrees: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Pet. App. 8a, quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). Although that rigid view has on occasion been followed by other courts, *see, e.g., Mayberry v. Maroney*, 558 F.2d 1159, 1163-64 (3d Cir. 1977), it is plainly wrong. This Court has made clear that the quoted language from *Swift* must be read in "context," *Dowell*, 111 S. Ct. at 636, and that a modification decision, like any other equitable ruling, should take into account all of the relevant equitable interests. *See System Federation No. 91*, 364 U.S. at 647-48. In particular, "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." 364 U.S. at 647-48.

The Court's decision in *System Federation* – a case involving only private parties – illustrates the balancing

required in modification cases. The Court held that a consent decree should be modified simply because Congress had changed the statute on which the decree was initially based; no inquiry was made into whether the change in law could have been "foreseen" or whether the decree was causing "grievous wrong" (other than that it had become legally incorrect). *See also King-Seeley Thermos Co. v. Aladin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (Friendly, J.) ("While changes in fact or law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purpose.").

A flexible approach is even more clearly mandated in cases involving supervision of *public* entities. Thus, the Court recently held that a desegregation decree should be terminated altogether once a court finds that constitutional requirements are being met and that defendants are unlikely to "return to their former ways." *Dowell*, 111 S. Ct. at 637. In so ruling, it was expressly held that the "language from *Swift* [quoted above] does not provide the proper standard to apply to injunctions entered in school desegregation cases." *Ibid.* Similarly, even before *Dowell*, the Court had ruled that a post-judgment decision that merely elaborates or clarifies the law provides strong support for eliminating a central provision of a desegregation decree. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 437-38 (1976).[1] The district court in this

[1] The decree in *Spangler* was ambiguous with respect to the disputed provision and the parties had interpreted it differently from the district court. The Court held that this consideration further supported modification. 427 U.S. at 438.

case was thus incorrect in concluding that a modification motion premised on an intervening ruling of this Court should be denied unless the decision "directly overrule[s] the legal interpretation on which the . . . consent decree was based." Pet. App. 10a.[2]

B. The Interests In Ensuring That A Federal Remedial Decree Affecting State Programs Is Properly Tailored Are Substantial And Ongoing.

It is by now axiomatic that federal decrees governing state operations must be narrowly tailored so that they do not intrude needlessly into the exercise of traditional state prerogatives by properly designated state executive and legislative officials. Those state interests do not forever vanish once a decree is entered. On the contrary, the essential constitutional line between remedying violations and broadly regulating state programs tends to become increasingly blurred during the process of implementing a decree.

1. This Court has repeatedly emphasized that "federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own laws." *Rizzo v. Goode*, 423 U.S. at 378 (internal quotes

[2] Indeed, in *Spangler*, itself, the decision that supported modification, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), did not overrule a prior decision that had been relied on by the district court. On the contrary, this Court indicated that *Swann* was not completely inconsistent with the district court's approach in *Spangler*. *See*, 427 U.S. at 434. Viewed in that light, the court below clearly erred in not modifying the decree in this case on the basis of the subsequent decisions in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981).

omitted). *See also Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943) ("It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states"). In particular, given the fundamental federalism and separation-of-powers concerns implicated by equitable decrees, the federal courts have an obligation "to tailor the scope of [a] remedy to fit the nature and extent of the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280 (1976). *See also Rhodes v. Chapman*, 452 U.S. at 351 ("courts must bear in mind that their inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a [state institution]") (internal quotes omitted).

The federalism dimension of the tailoring principle rests on "a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 111 (1981); *Rizzo v. Goode*, 423 U.S. at 379. That recognition is disserved by an overbroad remedial decree because it effects a needless and unjustified transfer of authority from the States to the federal courts. For example, a preference for single, rather than double, celling implicates not only policy choices about prison administration and security, but also economic decisions about how to allocate a State's resources. Thus, although a single-celling requirement might be promoted as nothing more than a decent benefit for prisoners, the fact is that

the money needed to satisfy such a requirement comes from other state programs, which would normally be able to compete for resources in the legislature but cannot do so in federal court.

In addition to respecting federalism concerns, a careful tailoring approach also rests on a separation-of-powers principles. As this Court observed in *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1975):

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible to solution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of the fact reflects no more than a healthy sense of realism.

Id. at 404-05, *See also Turner v. Safley*, 482 U.S. 78, 85 (1987).

Federal courts are not free to disregard these paramount federalism and separation-of-powers concerns simply because a remedy has been entered. Every day that an institutional decree exists, it has a major effect on important policy and budgetary issues. To the extent that such substantial displacements of state prerogatives are not necessary to cure federal law violations, therefore, they should readily be eliminated when a State seeks modification. That conclusion, as the Court explained in *Dowell*, is derived from "[c]onsiderations based on the allocation of powers within our federal system." 111 S. Ct. at 637. *See also Spangler*, 427 U.S. at 435 (district court "exceeded its authority" in enforcing an overbroad decree).

2. Two decades of experience with decrees governing state institutional programs also supports a flexible approach to modification. That experience teaches that an initial decree, far from ending the lawsuit, simply marks out a few of the boundaries within which further highly contentious and protracted litigation is then conducted. During the life of such a decree, many things directly affecting its implementation are sure to change. In addition, the federal courts, eager for good results and often frustrated by the intractable nature of institutional problems, tend to become increasingly involved in administered programs, typically through the use of judicial adjuncts such as masters or monitors, thereby heightening traditional federalism and separation-of-powers concerns.

a. The pervasiveness of broad federal court decrees that regulate the operations of state institutions is remarkable. More than 40 states were subject to a major prison decree during the decade of the 1980s, nine of which had their entire correctional system under decree. *See The National Prison Project, Status Report: The Courts and Prisons* (Jan. 1, 1990) (herein *Prison Project*).[3] About 60 percent of these decrees were entered by consent. *Ibid.* Although comparable numbers apparently have not been collected in mental health and mental retardation cases, there is no question that many States (probably well above half) operate under comprehensive remedial decrees in this area as well.

These remedial decrees, while not identical, nevertheless tend to resemble each other in significant

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[3] Copies of that report, summarizing the status of prison conditions litigation in each of the States, have been lodged with the Clerk of this Court in this case.

respects. In general, they contain dozens of pages (if not more) of detailed regulations comprehensively affecting institutional operations and physical plant. For example, approximately 80 percent of the prison decrees have population restrictions, usually through minimum square footage requirements, with about one-third containing single-celling provisions; more than 70 percent have requirements concerning educational and vocational opportunities for inmates; more than half have staffing requirements; a similar number have requirements concerning classification procedures (maximum, medium, or minimum security) and inmate discipline; and just under half contain visitation policies. *See* L. Thornburg, Attorney General of North Carolina, *National Prison Conditions Litigation Survey*, pp. 6-9 (1991) (hereinafter *National Prison Conditions Litigation Survey*).[4] Mental health or retardation decrees frequently require placement in the "least restrictive environment" – which has often been treated as meaning outside the institution and in "integrated community residences" – plus treatment designed to "maximize the individual's ability" and a host of other improvements in staffing, services, and living conditions. *See, e.g., Brewster v. Dukakis*, 687 F2d 495 (1st Cir. 1982); *New York State Assoc. for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972).

These decrees are commonly referred to as "structural injunctions," because their avowed purpose is to

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[4] Copies of this survey, which is based on responses by thirty-two States, have been lodged with the clerk of this Court in this case.

"effectuate the reorganization of an ongoing social institution." *Toussaint v. McCarthy*, 801 F.2d 1080, 1088 n.2 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), *quoting* O. Fiss, *The Civil Rights Injunction*, (1978). Given that goal, it is hardly surprising that such decrees rarely have an end point. Indeed, some have already been in effect for close to two decades. *See, e.g., Wyatt v. Stickney, supra* (mental health); *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975) (prisons). As Professor Fiss has aptly remarked: "The remedial phase in structural litigation . . . has a beginning, maybe a middle, but no end – well, almost no end. It involves a long and continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving or the shaping of the remedy itself." Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1, 27 (1979).

During this lengthy remedial process, many of the factors necessarily affecting it remain in continual flux. Until a decree is implemented, it is often difficult to anticipate how particular provisions – requiring movement from an institution to a community placement, for example – will actually work out or how much they will actually cost. In addition, such decrees are certain to outlast entire state administrations, let alone particular defendant officials. As a result, there will be personnel adjustments, policy adjustments, and budgetary adjustments that inevitably have a bearing on the remedial process. These variables are made yet more uncertain by the fact that the number of prisoners or patients covered by the decree will change over time. And the substantive law in the area of institutional rights is also constantly evolving and being clarified. Collectively, these considerations guarantee that the process of implementing a decree will be much more complex than the process of

designing one. *See, e.g., Pennsylvania Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3rd Cir. 1979) (noting vast practical differences between "relatively simple prohibitory injunctions" in cases like *Swift* and a "complex ongoing remedial decree" in public law cases). *See generally*, Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977); Special Report, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784 (1978).

b. This kind of process, whatever its legitimacy, is bound to cause friction between federal courts and the state governments they partly control. On the state side, the process has significant political and governmental implications, yet it is sheltered from the normal political processes in which competing policy positions as well as claims on resources are democratically resolved. On the judicial side, the length and complexity of the process frequently cause growing frustration with the State's response, thus leading to further judicial control and management. *See Generally* Diver, *The Judge As Political Powerbroker: Superintending Structural Change In Public Institutions*, 65 Va. L. Rev. 43 (1979).

The political dimensions of the process are pervasive. At its most obvious, an overbroad decree can have negative, even if unanticipated, consequences that are of major public concern. For example, according to the Attorney General of the United States, "[j]udicial involvement, by court order or consent decree, in establishing caps on inmate populations, has seriously curtailed the ability of state and local officials to manage prisons, jails and entire corrections systems effectively. It has also adversely affected public safety." U.S. Department of Justice, *Prison Crowding and Court-Ordered Population Caps:*

Report to the President 1990, at 1 (hereinafter *Prison Crowding*). More subtly, such decrees are sometimes used by government officials as "a ploy in some other struggle"; thus, officials who "have been frustrated by their inability to win political approval" for a program may find that a judicial decree provides political shelter by permitting those officials to claim that an unpopular program was required by the federal court. *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986). *See* Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L. J. 1265, 1294 ("There is commonly also a desire on the part of some officials to use a decree entered against them as a weapon in the political struggle to vindicate their view of the appropriate treatment, rehabilitation or other policy goal for the institution.").

In addition, broad structural decrees generate major financial problems. The costs of implementation, which are almost impossible to predict with any accuracy at the time a decree is entered, often turn out to be large and open-ended. For example, several States report that the costs of complying with prison decrees has been in the range of "hundreds of millions of dollars." *National Prison Conditions Litigation Survey* at 10-11. *See also Pennhurst State School and Hospital v. Halderman*, 451 U.S. at 24 (referring to the "enormous financial burden of providing 'appropriate' treatment in the 'least restrictive setting' "). As the Fifth Circuit has wisely observed, "it is simpler to order prison reform than to pay for it." *Pugh v. Rainwater*, 557 F.2d 1189, 1192 n.9 (1977). Not surprisingly, therefore, state legislatures and governors, faced with major portions of their budgets that are both off-limits and largely uncontrollable, become concerned. *See generally* Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715 (1978).

These concerns are frequently fueled by the fact that the state officials, who operate the prison or mental health system, frequently use decrees aggressively in the budgeting process. In particular, such officials essentially argue that, if their department does not get what it seeks, they will be compelled to tell the court that they cannot meet the decree's requirements, thus raising the spectre of contempt motions and yet more judicial control. As one Commissioner of Corrections candidly acknowledged, "I think the federal courts are going to have to force cities and states to spend more money on their prisons. . . . I look on the courts as a friend." Gettinger, "Cruel and Unusual" Prisons, 3 Corrections Magazine 3.5 (Dec. 1977), *quoted* in *Rhodes v. Chapman*, 452 U.S. at 361 (Brennan, J., dissenting). *Cf. Milliken v. Bradley*, 433 U.S. at 293 (Powell, J., concurring) (local school board and plaintiffs "have now joined forces apparently for the purpose of extracting funds from the state treasury"). *See* Horowitz, *supra* at 1294 ("An adverse decree that would require additional spending is also a weapon used by officials to augment their budget."). In view of this reality, the Seventh Circuit has cautioned that "district judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper v. Board of Education Comm'rs*, 814 F.2d 322, 340 (7th Cir. 1987).

The flip side of this coerced disruption of ordinary government decisionmaking, and also reinforcing the process, is the increase in judicial involvement in program administration that generally comes with implementation of a decree as time passes. If improvements are not apparent, the courts expand their efforts; and if improvements do seem apparent, the courts often conclude that it is because of their processes, thereby

warranting more of the same. Furthermore, once armed with a decree, judges appear to have an increasingly difficult time resisting the "natural tendency to believe that their individual solutions to often intractable problems are better and more workable" than those that are likely to come out of the political processes. *Bell v. Wolfish*, 441 U.S. at 562. But since the problems of prisons and mental hospitals "are not readily susceptible to solution by decree," *Procunier v. Martinez*, 416 U.S. at 405, those same judges frequently conclude that the decree is merely a starting point and that "real change" will require greater judicial involvement in such programs.

The clearest example of this expansionist approach can be seen in the use of judicial adjuncts in institutional cases. Thus, far from heeding this Court's repeated admonition about deferring to the expertise of the trained professionals who are actually responsible for operating institutional programs, *see, e.g., Procunier v. Martinez*, 416 U.S. at 404; *Youngberg v. Romeo*, 457 U.S. 307, 322 (1983), the district courts typically have brought in experts of their own, designating them as "masters" or "monitors." *See National Prison Conditions Litigation Survey* at 10 (60% of the states with decrees have masters or monitors); B. Porter, *Order by the Court: Special Masters In Corrections* 4 (1988) (nine states had entire prison system under the watch of a special master in 1988). These judicial adjuncts, which can be quite costly to States, *see National Prison Conditions Litigation Survey* at 10-11, are, for obvious reasons, even more likely than the courts to "become minutely involved in all aspects of correctional policy, ranging from the minimum allowable temperature of the food to the maximum number of days an inmate can be sentenced to segregation." *Prison Crowding* at 30. And just as their scope tends to expand, so too does their

power. Because they are the court's appointees, it is hardly surprising that, when a dispute occurs, "the court often defers to the[ir] judgment on compliance." *Ibid.* Consequently, satisfying the many demands of the court's experts becomes a major part of the politics of decree compliance.

Although the use of adjuncts is perhaps the clearest instance of this expansionist judicial approach, it is by no means the only one. The district courts have gone so far as to order prisoners released, *see Fambro v. Fulton County*, 713 F. Supp. 1426 (N.D. Ga. 1989); *Inmates of Allegheny County Jail v. Wecht*, 573 F. Supp. 454 (W.D. Pa. 1983), state institutions closed, *see, e.g., Homeward Bound, Inc. v. Hissom Memorial Center*, No. 85-C-437-E (N.D. Okla., July 27, 1987), and the restoration of funds for services to *non*-classmembers when such funds had been diverted to meet decree requirements applicable to classmembers, *see Philadelphia Police & Fire Ass'n v. City of Philadelphia*, 705 F. Supp. 1103 (E.D. Pa.), *rev'd*, 874 F.2d 156 (3d Cir. 1989). These examples fully confirm the Ninth Circuit's observation that the remedial process in prison and mental health cases "may lead to excessive [judicial] involvement and a breakdown of institutional perspective." *Toussaint v. McCarthy*, 801 F.2d at 1089. *See also Lelsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir.), *reh'g and reh'g en banc denied*, 815 F.2d 1034, *cert. dismissed*, 108 S. Ct. 44 (1987) (expressing concerning about "consent decrees [having] a life of their own virtually outside the law").

c. The dynamic and conflict-producing nature of this remedial process further supports a flexible approach to modification motions. It is simply unrealistic to expect that decree provisions affecting the full range of prison or hospital operations can sensibly endure unchanged for a decade or more. On the contrary, "[t]he particular choice

of remedy can never be defended with any certitude. It must always be open to revision without the strong showing traditionally required for modifications of a decree . . . if the remedy is not working effectively or is unnecessarily burdensome." Fiss, *supra*, 93 Harv. L. Rev. at 114. Thus, purely as a practical matter, such decrees are properly regarded as quintessentially "provisional and tentative." *Swift*, 286 U.S. at 114. *See* Note, *The Modification of Consent Decrees In Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1034 (1986) ("[t]he strong possibility that subsequent developments will render institutional reform relief outdated, ineffectual or counterproductive presents a compelling case for flexibility in modification").

In addition, a flexible approach to modification provides an important structural opportunity, by enabling the courts to ensure not merely that the decree remains properly tailored, but that the entire remedial process does so. Given the natural tendency of that process to become unhinged from the narrow constitutional issues that are its legitimate purview, this taking-stock function can be highly constructive. It allows the district court to shift back from an atypical, participatory function to its more traditional judicial function – *i.e.*, ascertaining the dimensions of the legal rights at issue and reconfiguring the decree in terms of those rights. Equally important, in contrast to a rigid modification standard, a flexible approach provides a meaningful opportunity for appellate review, which is likely to have a much-needed "disciplining" effect on the district courts. As the Ninth Circuit has explained, in the context of institutional remediation an appellate court "is in a better position to assure detached neutrality"; indeed, "other than appellate review, few effective controls check the district court's

power" in these circumstances. *Toussaint v. McCarthy*, 801 F.2d at 1089.

C. The Legitimate Finality Interest Implicated By Institutional Decrees Are Slight And Can Readily Be Accommodated Within the Structure of a Flexible Approach to Modification.

The two considerations that generally weigh against modification are unfairness and inefficiency. *See, e.g., Swift*, 286 U.S. at 119-20. Neither one is especially strong in the present context, let alone sufficient to overcome the compelling justifications for flexibility. First, a flexible modification standard is not unfair to plaintiffs, who likewise stand to benefit from such a standard and who will, in all events, receive what they are entitled to under federal law. Second, appropriate concerns about avoiding the relitigation of issues that have previously been decided, to the extent they exist, can be taken into account without impairing the requisite flexibility.

1. The suggestion that a flexible modification standard would somehow be unfair to plaintiffs is misguided. To begin with, such a standard would, of course, apply to plaintiffs and defendants alike. Thus, if the law evolves or is clarified to expand federal rights, plaintiffs would be entitled to a modification regardless of whether that legal ruling "directly overrule[d] any legal interpretation on which the [original] decree was based," Pet. App. 10a, or whether such a legal development could be said to have been "unforeseen" at the time the decree was entered, *Swift*, 286 U.S. at 119. It hardly seems plausible, for example, that notions of finality, even in a consent decree case, could be thought to bar modification of a decree that allowed double celling if this Court, only one day after its entry, held such a practice to be unconstitutional.

In any event, it is difficult to see why either party should be heard to complain that it is entitled to the benefits of an over- or under-inclusive decree on a prospective basis. To the contrary, the party opposing modification already will have received *more* than it was entitled to, probably for quite a few years. Moreover, in contrast to a case like *Swift* – which involved a prohibition on entry into several different lines of business – a decree in an institutional case is unlikely to create legitimate reliance interests that would be unfairly impaired by later modification.

2. The finality interests associated with the efficient use of judicial resources are also diminished in the present context. In the first place, the aspect of finality that concerns itself with bringing disputes to an end, *see, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), is, as a practical matter, of no consequence here. As noted earlier, a judicial decree in an institutional case, "in Churchill's phrase, signals not the end, nor even the beginning of the end, but only the end of the beginning of the remedial process." Rhode, *Class Conflict in Class Actions*, 34 Stan. L. Rev. 1183, 1187 (1982). An uninterrupted flow of adversarial litigation over compliance issues characterizes that process. *See, e.g., Halderman v. Pennhurst State School and Hospital*, 610 F. Supp. 1221, 1222 E.D. Pa. 1985) (district court in mental retardation case issued 500 orders and 28 published opinions during first 11 years of litigation that is still ongoing today); *United States v. Michigan*, 680 F. Supp. 928, 935-1064 (W.D. Mich. 1987) (reprinting 37 different enforcement orders in a consent decree case). As a result, a rule facilitating the modification of excessive decrees is likely to conserve overall judicial resources by limiting the scope of the court's involvement.

The remaining aspect of finality, which concerns itself with avoiding the inappropriate relitigation of issues that have already been decided, *see, e.g., Angel v. Bullington*, 330 U.S. 183, 192-93 (1947), is likewise of diminished importance here. The question raised by a modification motion in this context is simply whether the court's existing order is properly tailored to protect the plaintiffs' rights. By and large, as in this case, that question will turn on a legal analysis, thus requiring relatively little of the court's time, especially when viewed in light of the significance of these issues. That point is all the more true where a decree is the product of consent and, therefore, the court has never previously had to rule on such legal issues.

In those cases where a modification motion depends on factual issues, a court may reasonably rely on the presumptive validity of any prior findings. As time passes, however, that presumption should weaken, and the courts should more readily allow factual hearings concerning *present* conditions at a state facility. This approach should cover a significant number of consent decree cases as well, since many such decrees occur after liability findings are made. *See* P. Cooper, *Hard Judicial Choices: Federal District Court Judges and State and Local Officials* 336 (Oxford Univ. Press, Inc. 1988). And in consent decree cases where no liability findings have been made, the courts should be willing to hear modification motions based on factual claims, unless there is reason to believe that a party may have been sandbagging the court or its adversary – by agreeing to a consent judgment only to buy time to mount a factual defense or to disrupt its adversary's efforts. *Cf. Lawrence Manufacturing Co. v. Jonesville Cotton Mills*, 138 U.S. 552, 562 (1891). ("The prior decree was the consequence of consent, and not of the

judgment of the court, and, this being so, the court had the right to decline to treat it as *res judicata*."). *See generally* McConnell, *Why Hold Elections? Using Consent Decrees To Insulate Policies From Political Change*, 1987 Univ. Chi. Legal Forum 295, 306-07.[5]

II. A FEDERAL COURT CONSENT DECREE DIRECTED AT STATE PROGRAMS SHOULD BE SUBJECT TO THE SAME FLEXIBLE MODIFICATION STANDARD AS A CONTESTED REMEDY.

This Court has previously held that, when it comes to modifying equitable decrees, "[t]he result is all one

[5] The area that appears to present the greatest potential for confusion in terms of factual findings relates to so-called "totality of conditions cases" in which the plaintiffs claim that the institution is so awful that it must be completely restructured (in prison cases) or dismantled (in mental health and retardation cases). *See, e.g., Duran v. Carruthers*, 885 F.2d 1485, 1490 (1989), *cert. denied*, 110 S.Ct. 865 (1990) (every aspect of a massive consent decree justified by the "totality of conditions" that plaintiffs alleged). In substantial measure, we think that such a view rests on a misunderstanding of Eighth Amendment rights, and that, purely as a matter of law, a much more careful tailoring approach is necessary when modification is sought. *See Ruiz v. Estelle*, 679 F.2d 1115, 1140 n. 98, 1153 (5th Cir. 1982), *cert. denied*, 464 U.S. 915 (1983) ("a generalized and vague conclusion concerning the totality of conditions is insufficient": "The 'totality of the circumstances' test does not authorize [a federal court] to reform all deficient prison conditions. The remedy must be confined to the elimination of those conditions that together violate the Constitution."). In any case, if a *consent* decree rests on allegations, without judicial findings, of pervasive abuse and harm to prisoners or patients, those factual matters should be resolved by the court if they are contested in a modification motion. The possibility that an issue of that magnitude could be covered up cosmetically is far too remote to justify preventing a State from securing at least one set of factual findings, based on adversarial testing, before such "facts" are allowed to support a massively intrusive federal court order on an indefinite basis.

whether the decree has been entered after litigation or by consent." *United States v. Swift & Co.*, 286 U.S. at 114. *See also System Federation No. 91 v. Wright, supra*. There is no reason to depart from that view here. A contractual theory for perpetuating overbroad federal court decrees governing state programs has all of the shortcomings of a finality theory, while also raising serious constitutional problems of its own.

A. A Flexible Approach To Modification Will Not Decrease The Likelihood of Settlement.

The principal argument against a flexible approach to consent decree modification in particular is that "[i]t would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to . . . arguably required more of the defendants than the absolute minimum they would be constitutionally required to do." Pet. App. 12a-13a. Although we doubt that such a rationale could justify continuing an overbroad decree in the face of the concerns that we have discussed above, we think the rationale is insupportable on its own terms.

There are a variety of strong incentives that lead the parties to settle institutional litigation. *See generally* Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. Ill. L. Rev. 579, 580-82 (describing "special incentives to settle" these kinds of cases); Resnik, *Judging Consent*, 1987 Univ. Chi. Law Forum 43, 63-85. From the plaintiffs' point of view, settlement provides the opportunity for substantial relief without awaiting years of trial and appellate proceedings. It also ensures the defendants' initial cooperation, which is certainly desirable, if not indispensable, in tackling the kinds of problems addressed in structural-

reform litigation. *See, e.g., United States v. City of Miami*, 614 F.2d 1322, 1333 (5th Cir. 1980) ("when agreement is reached by consent, voluntary compliance is more likely"), *rev'd on other grounds*, 664 F.2d 435 (5th Cir. 1981) (*en banc*). For the defendants, a settlement avoids spending millions of dollars on legal fees (the plaintiffs' as well as their own) and allows them to maximize their participation in formulating the decree, an opportunity that may be substantially diminished if plaintiffs prevail after years of contentious litigation.

Those incentives are sufficient to encourage reasonable settlements in institutional cases even without a guarantee that a decree, once entered, will be almost impossible to change. If anything, such rigidity is likely to make settlement less likely in these cases. As the Third Circuit has noted, "[a]n approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation." *Pennsylvania Welfare Rights Organization v. Shapp*, 602 F.2d at 1120. *See also* Memorandum from the Attorney General, Department Policy Concerning Consent Decrees and Settlement Agreements (Mar. 13, 1986) (strictly limiting authority of Justice Department lawyers to settle cases because of concerns about inflexibility of remedial decrees), reprinted in relevant part at 54 U.S.L.W. 2492 (Apr. 1, 1986).

B. A Contractual Theory Does Not Justify Perpetrating A Decree Governing State Operations.

The second rationale relied on by proponents of a rigid modification standard is that the State should be required to live up to its contractual agreements. *See* Pet.

App. 12a ("Defendants' agreement in this case was a firm one"). That argument is flawed in several respects. Not only does it misperceive the range of interests affected by a judicial decree but, more fundamentally, such an approach is inconsistent with basic notions of federalism and the Eleventh Amendment. This Court's decision in *Local No 93, Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), does not support a different conclusion.

1. Reliance on contractual principles to justify a consent decree in the face of a modification motion ignores the significance of the fact that such a decree is not merely a private agreement, but also an enforceable court order. For that reason, this Court has indicated that "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *System Federation No. 91*, 364 U.S. at 651. Thus, the contractual underpinnings of a consent decree should not make it any less subject to modification than any other ongoing court order.

On the contrary, there are particularly strong reasons not to accord contract principles any weight in the present context. First, the federal courts have a fundamental institutional interest – especially given the scope, complexity and longevity of these kinds of cases – in "limiting the range of disputes in which [they] can be dragged by means of an overly broad consent decree." *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1544 (3d Cir. 1984) (Becker, J., concurring). *See also Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 341 (7th Cir. 1987) ("[e]very hour consumed administering a consent decree is an hour taken from other litigants, who must wait in a longer queue"). Second, regardless of the parties' consent, an equity court must always take cognizance of the "public interest" in ruling on a modification motion. That interest is uniquely

affected by a decree that shelters important policy decisions from democratic adjustment. *See, e.g., New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir.) *cert. denied*, 464 U.S. 915 (1983) (Friendly, J.) (consent decrees "in institutional reform litigation" should be subject to a flexible standard of modification "to accomodat[e] . . . a wider constellation of interests than is represented in the adversarial context of the courtroom"). Lastly, as we now show, reliance on the consent of state officials to bind the State to an ongoing federal court decree violates principles of federalism and the Eleventh Amendment.

2. A fundamental tenet of democratic government is that "[f]uture lawmakers have just as much power to depart from the decisions of their forebears as their forebears had to make the decisions in the first place." McConnell, *supra*, 1987 Univ. Chi. Legal Forum at 296. Thus, those who are currently in office "can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" *Stone v. Mississippi*, 101 U.S. 814, 820 (1879). *See also Chicago & Alton R.R. v. Tranberger*, 238 U.S. 67 (1915). Based on that recognition, this Court has consistently refused to apply the Contract Clause to enforce state agreements that commit to a particular exercise of traditional governmental powers. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977); *El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-38 (1934).

To the extent that a federal court consent decree goes beyond the enforcement of federal rights, therefore, it should be revocable by the same process that it was adopted – *i.e.*, an appropriate motion in federal court.

Strictly in terms of contract principles, such agreements should be deemed unenforceable because every State's law prohibits its officers from bargaining away the sovereign powers of their successors. *See generally* Easterbrook, *Justice and Contract in Consent Judgments*, 1987 Univ. Chi. Law Forum 19, 33-40. That is obviously all the more true when, as in institutional cases, the defendants bind not only the executive but also current and future legislatures, which are not parties to the litigation but must nevertheless live by, as well as pay for, the decree. More fundamentally, to insist that such a contract be enforceable on the ground that it was embodied in a court order completely ignores core sovereign interests of the States, without serving any legitimate, let alone overriding, federal interest. *See* Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796 (1988).

Such insistence would also violate the Eleventh Amendment expressly. The sole justification for the ruling in *Ex Parte Young*, 209 U.S. 123 (1908), is that a narrow exception to the Eleventh Amendment "was necessary to permit the federal courts to vindicate federal rights." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. at 105. To achieve that result, the Court relied on the "fiction" that state officials, when acting beyond constitutional limits, are not the State and thus may be sued in federal court. But it would completely pervert the legitimate purposes of both the exception and the fiction if they were interpreted to allow defendant state officials to bind the State to *extra*-constitutional measures. *See Washington v. Penwell*, 700 F.2d 570, 574 (9th Cir. 1983) (enforcing overbroad consent decree agreed to by defendant officials would "result in an *ultra vires* judicial attempt to

bind a nonparty, the state, to the litigation and would create an impermissible constitutional confrontation between the federal court and the state legislature").

3. The decision in *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), does not support a contrary view.[6] In particular, the language from *Local 93* relied on by the lower courts (*see* n. 6, *supra*) – *i.e.*, that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial," 478 U.S. at 525 – cannot properly be extended to cases involving modification motions.[7] By its terms, that language speaks only of the "entry" of a consent decree, which takes place at a time when the parties support the decree and, consequently, there is typically neither a reason nor a meaningful way for the district court to subject it to adversarial testing. Thus, a standard for authorizing entry of a consent decree that does not require federal courts to impose the more exacting tailoring principles applicable in

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[6] Two circuits have relied on *Local 93* to deny modifications of legally excessive decrees in prison cases. *See Duran v. Carruthers*, 885 F.2d at 1491; *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1987). *But see Lelsz v. Kavanagh*, 807 F.2d at 1252; *Washington v. Penwell*, 700 F.2d 570, 574 (9th Cir. 1983) (pre-*Local 93*).

[7] The specific standard adopted in *Local 93* requires that "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must 'com[e] within the general scope of the case made by the pleadings,' and must further the objectives of the law upon which the complaint was based." 479 U.S. at 527.

disputed litigation rests on the practical realities of the situation. At most, that is what *Local 93* stands for.[8]

In contrast to the situation discussed in *Local 93*, however, when a State moves to modify, it can no longer properly be said that "the parties' consent animates the legal force of a consent decree." 478 U.S. at 525. At that point, unless (contrary to our earlier submission) "contract" principles require that consent can never be revoked once given in federal litigation, the *future* legitimacy of the decree must turn on "the law which forms the basis of the claim." *Ibid. Cf. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 558, 576 n.9 (1985) ("Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the city").[9]

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[8] It is not even clear that *Local 93* intended to establish a general standard for approving entry of federal consent decrees in all cases. The opinion focuses on the particular statutory policies of Title VII, *see* 478 U.S. at 513, 515, 517 n.8, thus suggesting that its holding was limited to that context. Moreover, the Court's words – stating that "a federal court is not *necessarily* barred from entering a consent decree *merely because* the decree provides broader relief than the court could have awarded after trial" (478 U.S. 525 (emphasis added)) – hardly suggest that it was announcing a broad affirmative principle. To the contrary, the Court further stated that, even if a decree satisfied the *necessary* conditions (set out in n.7 *supra*), it still might "otherwise [be] shown to be unlawful." 478 U.S. at 526.

[9] The Court in *Local No. 93* itself recognized that the standards governing entry of a decree were different from the standards governing modification. It noted that, while entry of a consent decree does not implicate § 706(g) of Title VII, a ruling on a motion to modify a consent decree does implicate § 706(g). 478 U.S. at 523 n.12. And the Court carefully distinguished from the entry case before it (478 U.S. at 526-28) two

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In any event, the Court in *Local 93* had no occasion to consider the Eleventh Amendment or federalism issues presented in this case. Aside from the fact that the governmental entity there involved was a city, not a State, that entity *supported* the decree. The Court also treated the city no differently from a private party, reflecting the fact that Title VII does not distinguish between such employers. Indeed, in enacting Title VII, Congress expressly abrogated the States' Eleventh Amendment protection. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). By contrast, Congress has left that protection, and the federalism concerns it reflects, in tact in institutional cases like this one. *See Quern v. Jordan*, 440 U.S. 332 (1979). For those reasons as well, *Local 93* is not properly read to authorize the continuation of an overbroad consent decree on contract grounds.

CONCLUSION

The amici states respectfully urge this Court to reverse the decision of the court of appeals.

Respectfully submitted,

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decisions that involved motions to modify – *System Federation No. 91, Ry. Employers' Dep't v. Wright, supra*, and *Firefighters Local Union No. 1784 v. Stotts, supra*.